Supreme Court, U.S.
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No. 91-2057

In The

Supreme Court of the United States

October Term, 1992

WOLPOFF & ABRAMSON,

Petitioner,

vs.

SUSAN CARROLL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Fourth Circuit correctly found that the Fair Debt Collection Practices Act requires that all communications made to collect a debt or to obtain information about a consumer, both initial and subsequent, contain the debt collection warning required by 15 U.S.C. § 1692e(11) that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Statement of the Case 2

Summary of Argument 3

Reasons for Denying the Writ 4

I. The Fourth Circuit's decision does not significantly impact on the practice of law. 4

II. Wolpoff & Abramson's reliance on the proposed Commentary is misplaced and misleading. 7

III. The doctrine of legislative re-enactment does not mandate a finding contrary to that of the Fourth Circuit. 9

IV. Wolpoff & Abramson incorrectly asserts that the Fourth Circuit failed to consider the legislative history of the FDCPA. 10

Conclusion 11

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Cacace v. Lucas, 775 F. Supp. 502 (D. Conn. 1990) 6

Carroll v. Wolpoff & Abramson, 961 F.2d 459 (4th Cir. 1992) 1, 3, 4, 6, 8, 9

Emanuel v. American Credit Exchange, 870 F.2d 805 (2d Cir. 1989) 5

Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037 (8th Cir. 1984) 5, 6, 8

Louisville and N.R. Co. v. United States, 282 U.S. 740 (1931) 9

Mass. Mutual Life Ins. Co. v. United States, 288 U.S. 269 (1933) 9

Miller v. Payco-General American Credits, 943 F.2d 482 (4th Cir. 1991) 10

Mowbray v. Kozlowski, 914 F.2d 593 (4th Cir. 1990) 8

Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22 (2d Cir. 1989) 3, 6, 9, 10

Pressley v. Capital Credit and Collection Service, Inc., 760 F.2d 922 (9th Cir. 1985) 3, 4, 6, 7, 9, 10

Contents

Page

Seabrook v. Onondaga Bureau of Medical Economics, Inc., 705 F. Supp. 81 (N.D.N.Y. 1989) 6

Scott v. Jones, ____ F.2d ____ (4th Cir. 1992) 8

Staub v. Harris, 626 F.2d 275 (3d Cir. 1980) 8

Wollfolk v. Van Ru Credit Corp., 783 F. Supp. 724 (D. Conn. 1990) 6

Young v. Credit Bureau of Lockport, Inc., 729 F. Supp. 1421 (W.D.N.Y. 1989) 6

Statutes Cited:

Pub. L. No. 99-361 (1986), 100 Stat. 768 9

15 U.S.C. § 1692a(2) 5, 6

15 U.S.C. § 1692a(3) 2

15 U.S.C. § 1692a(6) 2

15 U.S.C. § 1692e 2

15 U.S.C. § 1692e(11) .....passim

15 U.S.C. § 1692k(e) 8

15 U.S.C. § 16921(d) 7

Contents

Page

Other Authorities Cited:

S. Rep. No. 382, 95th Cong. 1st Sess. 5, 6 (1977) 7

51 Fed. Reg. 8019 (March 7, 1986) 4

53 Fed. Reg. 50097-50110 (December 13, 1988) 7, 8

APPENDIX

Appendix A — Letter of June 11, 1990 ..... 1a

No. 91-2057

In The

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WOLPOFF & ABRAMSON,

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals has now been reported as *Carroll v. Wolpoff & Abramson,* 961 F.2d 459 (4th Cir. 1992). A copy of the District Court opinion, which was not reported, is attached to the Petition for a Writ of Certiorari at App. B.

STATEMENT OF THE CASE

On June 11, 1990 Wolpoff & Abramson, a law firm, sent a collection letter to Susan Carroll (App. A, *infra*, 1a). Susan Carroll is a "consumer" within the meaning of the definition contained in the Fair Debt Collection Practices Act (hereinafter FDCPA or the Act), 15 U.S.C. § 1692a(3), and Wolpoff & Abramson is a "debt collector" under the terms of 15 U.S.C. § 1692a(6). Wolpoff & Abramson maintains that it sent other correspondence regarding the same account to Susan Carroll prior to the June 11, 1990 letter. The June 11 letter does not contain the disclosure required by the FDCPA at 15 U.S.C. § 1692e(11). The Act states:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> > (11) Except as otherwise provided for communications to acquire location information under section 804, the failure to disclose clearly in all communications made to collect a debt or obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

15 U.S.C. § 1692e.

Susan Carroll filed her Complaint in the United States District Court for the District of Maryland on May 10, 1991 alleging

violations of the FDCPA, one of which was violation of 15 U.S.C. § 1692e(11).

Cross-motions for summary judgment were filed and on July 30, 1991 the District Court denied plaintiff's motion, granted defendant's motion and issued a Memorandum Opinion, a copy of which is reprinted as App. B in Wolpoff & Abramson's Petition for a Writ of Certiorari. The District Court noted that the Ninth Circuit in *Pressley v. Capital Credit and Collection Service, Inc.*, 760 F.2d 922 (9th Cir. 1985), had ruled that follow-up communications need not contain the required notice while the Second Circuit in *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989), expressly rejected *Pressley* and found that all communications must contain this disclosure. The District Court declined to make a literal application of the statutory langauge and followed *Pressley*.

The Fourth Circuit reversed finding the plain language of the statute "clear and unambiguous." *Carroll v. Wolpoff & Abramson, supra* at 461.

SUMMARY OF ARGUMENT

The Fourth Circuit correctly found that Wolpoff & Abramson violated the FDCPA requirement that all communications must contain the 15 U.S.C. § 1692e(11) debt collection warning. While this opinion conflicts with the Ninth Circuit's opinion in *Pressley v. Capital Credit and Collection Services, Inc.*, 760 F.2d 922 (9th Cir. 1985), it is entirely consistent with the Second Circuit's opinion in *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989) and with every other decision, both reported and unreported, construing this statutory section.

Wolpoff & Abramson vastly overstates the effect of the Fourth Circuit's holding. The statutory provision at issue is easily

satisfied by the inclusion of the phrases in every communication from a debt collector to an alleged debtor. Despite Wolpoff & Abramson's contention to the contrary, there is no "profound impact on the practice of law." (Petition for a Writ of Certiorari at p. 5).

Wolpoff & Abramson's reliance on the FTC Proposed Official Staff Commentary, 51 Fed. Reg. 8019 (March 7, 1986) is entirely misplaced. The Commentary is non-binding and squarely conflicts with the statutory language.

Finally, Wolpoff & Abramson incorrectly asserts that the Fourth Circuit "completely disregarded two opinions which were incorporated into the Act through congressional re-enactment of the statute." (Petition for a Writ of Certiorari at p. 5). In fact, the Fourth Circuit considered the proposed Staff Commentary and the Ninth Circuit opinion in *Pressley, supra*, and, for very specific reasons, declined to follow them.

REASONS FOR DENYING THE WRIT

I.

The Fourth Circuit's decision does not significantly impact on the practice of law.

The Fourth Circuit has held that the FDCPA, pursuant to 15 U.S.C. § 1692e(11), requires that *all communications* (emphasis added) made to collect a debt or obtain information about a consumer contain the warning that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. *Carroll v. Wolpoff & Abramson, supra* at 461. In so holding, the court has enforced the exact statutory language.

Wolpoff & Abramson maintains that the Fourth Circuit's

ruling significantly impacts upon the practice of law. It intimates that the Fourth Circuit's opinion may require the Section 1692e(11) disclosure in legal documents such as complaints, interrogatories, execution and other pleadings (Petition for a Writ of Certiorari at p. 9). Such an interpretation goes well beyond the scope of the Fourth Circuit's holding. There is no question that the June 11, 1990 letter sent to Susan Carroll by Wolpoff & Abramson, the only communication at issue in this case, constituted a "communication" under the terms of the FDCPA. 15 U.S.C. § 1692a(2). It is also undisputed that the letter failed to contain the § 1692e(11) debt collection warning. The communication sent was not a pleading, interrogatory, writ of garnishment, notification of lien on property, or an appellate brief. Nor was it an item of correspondence required to be sent under any statute prior to a proceeding executing on a debt. Wolpoff & Abramson effectively is asking this Court to review the Fourth Circuit's opinion due to their fear of an expansion of this opinion in later litigation. The Fourth Circuit was not called upon to, and did not, consider the statutory section's application to pleadings and other legal documents. As the Fourth Circuit did not reach that issue, there is no need for this Court to consider it.

Compliance with the statute and with the Fourth Circuit's opinion is simple. A collector, whether attorney or non-attorney[1], need only include the § 1692e(11) debt collection warning in all communications. There is no question that initial communications with consumer debtors must contain the § 1692e(11) notice. *Emanuel v. American Credit Exchange,* 870 F.2d 805 (2d Cir. 1989); *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037 (8th Cir. 1984). Wolpoff & Abramson acknowledges that its two earlier letters, dated August 9 and November 11, 1989, to Susan

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1. Wolpoff & Abramson's assertion that requiring the disclosure in all communications gives some advantage to non-attorneys (Petition for a Writ of Certiorari, pp. 9-10) is entirely unsupported.

Miller contained the collection warning required by 15 U.S.C. § 1692e(11) (App. D to Petition for a Writ of Certiorari, D-2).

Wolpoff & Abramson and all other collectors, whether attorney or non-attorney, need only add the debt collection warning to subsequent communications to comply with 15 U.S.C. § 1692e(11). Including the warning in follow-up communications would not present a creditor with a problem in the Ninth Circuit. Compliance with *Pipiles* and *Carroll* as to § 1692e(11) would presumably satisfy all Circuits. The existence of the conflict therefore presents no real problem for collectors, regardless of the jurisdictions in which they operate.

Except for the Ninth Circuit in *Pressley v. Capital Credit & Collection Services, Inc.*, 760 F.2d 922 (9th Cir. 1985), all courts addressing this issue have required the provision of the debt collection warning pursuant to 15 U.S.C. § 1692e(11). *Carroll v. Wolpoff & Abramson, supra; Pipiles v. Credit Bureau of Lockport, Inc., supra; Hulshizer v. Global Credit Services, Inc., supra; Wollfolk v. Van Ru Credit Corp.*, 783 F. Supp. 724 (D. Conn. 1990); *Cacace v. Lucas*, 775 F. Supp. 502 (D. Conn. 1990); *Young v. Credit Bureau of Lockport, Inc.*, 729 F. Supp. 1421 (W.D.N.Y. 1989); and *Seabrook v. Onondaga Bureau of Medical Economics, Inc.*, 705 F. Supp. 81 (N.D.N.Y. 1989).

The Ninth Circuit in its *Pressley* decision held that "the follow up notice sent in this case is not a 'communication' within which the disclosure required by 15 U.S.C. § 1692e(11) must be made." *Supra* at 825. This holding redefines the term "communication" and distorts the meaning which is defined in the Fair Debt Collection Practices Act as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). The Second Circuit in the *Pipiles* decision and the Fourth Circuit in the *Carroll* decision would not reach such a result and applied the "clear and unambiguous"

language of the statute to require the debt collection warning of § 1692e(11) to be disclosed in all communications.

II.

Wolpoff & Abramson's reliance on the proposed Commentary is misplaced and misleading.

In addition to relying upon the Ninth Circuit's opinion in *Pressley v. Capital Credit and Collection Services, Inc., supra,* Wolpoff & Abramson criticize the Fourth Circuit for failing to follow the Federal Trade Commission's Proposed Official Staff Commentary. Wolpoff & Abramson have incorrectly focused upon the "proposed" FTC Official Staff Commentary on the Fair Debt Collection Practices Act. The Commentary is no longer "proposed" and is published at 53 Fed. Reg. 50097-50110 (December 13, 1988). Both the Commentary and the Proposed Commentary as it relates to § 1692e(11) (reprinted at App. E of the Petition for a Writ of Certiorari) state that the notice is required only in initial communications. The FDCPA however, explicitly prohibits the promulgation of trade regulation rules or other regulations under the Act. 15 U.S.C. § 16921(d). Both the statutory enactment and the legislative history make it abundantly clear that the legislation was comprehensive and self-enforcing. S. Rep. No. 382, 95th Cong. 1st Sess. 5, 6 (1977).

The FTC recognized this limitation and stated in the introduction to its Official Staff Commentary on the Fair Debt Collection Practices Act:

> This Commentary is the vehicle by which the staff of the Federal Trade Commission publishes its interpretations of the Fair Debt Collection Practices Act (FDCPA). It is a guideline intended to clarify the staff interpretations to the statute,

> but does not have the force or effect of statutory provisions. It is not a formal trade regulation rule or advisory opinion of the Commission, and thus is not binding on the Commission or the public.

53 Fed. Reg. 50097-50110, at 50101 (December 19, 1988).

The proposed Commentary was prepared as a compilation of and replacement for staff opinion letters previously issued by the FTC. These letters are not binding on the FTC, let alone the courts. *Scott v. Jones*, ____ F.2d ____ (4th Cir. 1992); *Staub v. Harris*, 626 F.2d 275 (3d Cir. 1980). The proposed Commentary therefore should be accorded little weight. In an earlier decision, similar to the one presented here, the debt collector relied upon a staff letter from an attorney in the Division of Credit Practices for the Federal Trade Commission and argued that the violation of the FDCPA was unintentional. The Eighth Circuit ruled that the collector's reliance thereon was in conflict with the "clear language" of the statute. The "unambiguous" language of 15 U.S.C. § 1692e(11) required the debt collection warning be provided to the consumer. *Hulshizer v. Global Credit Services, Inc., supra* at 1038.

Wolpoff & Abramson misleads the Court by referring to collector immunity allowed under 15 U.S.C. § 1692k(e) for reliance on formal FTC advisory opinions (Petition for a Writ of Certiorari at p. 12). The Commentary is not a formal advisory opinion and reliance would not provide a "good faith" defense. In fact, no formal opinions on the FDCPA have issued from the Federal Trade Commission.

Further, the Fourth Circuit clearly considered the FTC's position and rejected it, *Carroll v. Wolpoff & Abramson, supra* at 461, n.4, citing *Mowbray v. Kozlowski*, 914 F.2d 593 (4th Cir. 1990), due to its conflict with the clear and unambiguous statutory language.

III.

The doctrine of legislative re-enactment does not mandate a finding contrary to that of the Fourth Circuit.

In 1986 Congress amended the FDCPA by deleting the former exception of attorneys from the definition of debt collectors. Pub. L. No. 99-361 (1986), 100 Stat. 768. Wolpoff & Abramson incorrectly maintains that the existence of the FTC Proposed Commentary on § 1692e(11) and the Ninth Circuit opinion in *Pressley* at the time of the amendment require a finding consistent with those interpretations. However, when statutory language "is unambiguous and the regulation clearly inconsistent with it," *Mass. Mutual Life Ins. Co. v. U.S.*, 288 U.S. 269, 273 (1933), the regulatory language will not carry over in a re-enactment. *See also, Louisville and N.R. Co. v. United States*, 282 U.S. 740, 759 (1931).

The Fourth Circuit considered Wolpoff & Abramson's argument of the doctrine of legislative re-enactment but followed the analysis articulated by the Second Circuit in *Pipiles v. Credit Bureau of Lockport, Inc.*, *supra*. *Carroll v. Wolpoff & Abramson*, *supra* at 461. Therein, the *Pipiles* Court stated:

> "The starting point for our interpretation of a statute is always its language." *Mobil Oil Corp. v. Karbowski*, 879 F.2d 1052, 1054 (2d Cir. 1989) (quoting *Community for Creative Non-Violence v. Reid*, ____ U.S. ____, 109 S. Ct. 2166, 2172 (104 L. Ed. 2d 811 (1989)). "Thus, '[a]bsent a clearly expressed legislative intention to the contrary, [the language used] must ordinarily be regarded as conclusive.'" *Id.* (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980).

Pipiles v. Credit Bureau of Lockport, Inc., supra at 26. The Second Circuit then rejected the holding of the *Pressley* Court and held that the debt collection warning of 15 U.S.C. § 1692e(11) was required in all communications.

Contrary to Wolpoff & Abramson's position, the doctrine of legislative re-enactment is not applicable to this case.

IV.

Wolpoff & Abramson incorrectly asserts that the Fourth Circuit failed to consider the legislative history of the FDCPA.

Wolpoff & Abramson asserts that the Fourth Circuit failed to look to legislative intent. The Fourth Circuit's opinion refers to its earlier decision in *Miller v. Payco-General American Credits,* 943 F.2d 482 (4th Cir. 1991), in which legislative intent and history of the Act are discussed. The Fourth Circuit also considered the purpose of the debt collection warning in its opinion below. *Supra* at 461. It approved the rationale of the Second Circuit in *Pipiles v. Credit Bureau of Lockport, Inc.,* which stated: "Congress [may] exercise its legislative judgment to adopt a reasonable margin of safety to insure its remedial goal." *Supra* at 27. Further, the Fourth Circuit considered the reasoning of the Ninth Circuit in *Pressley v. Capital Credit and Collection Service, Inc., supra,* particularly its analysis of the legislative history, and rejected it. Again citing *Pipiles,* the Fourth Circuit stated that the *Pressley* analysis "based in the remarks of one senator was strained" and effectively would work a change in the express statutory language. *Id.* at 461.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: July 21, 1992

Respectfully submitted,

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APPENDIX A — LETTER OF JUNE 11, 1990

LAW OFFICES
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ROCKVILLE, MARYLAND 20852-3164

June 11, 1990

12453312 D

SUSAN J. MILLER
206 HOLLINGSWORTH MANOR
ELKTON MD 21921

Re: MACY'S
VS.
SUSAN J. MILLER

Our File No. 12453312 D

Your past due account is in our office for legal action.

It is imperative that you contact us immediately if you wish to make arrangements to pay this debt prior to additional litigation.

Very truly yours,

WOLPOFF AND ABRAMSON